

## REGULATION 14D

## ATTENTION ELECTRONIC FILERS

THIS REGULATION SHOULD BE READ IN CONJUNCTION WITH REGULATION S-T (PART 232 OF THIS CHAPTER), WHICH GOVERNS THE PREPARATION AND SUBMISSION OF DOCUMENTS IN ELECTRONIC FORMAT. MANY PROVISIONS RELATING TO THE PREPARATION AND SUBMISSION OF DOCUMENTS IN PAPER FORMAT CONTAINED IN THIS REGULATION ARE SUPERSEDED BY THE PROVISIONS OF REGULATION S-T FOR DOCUMENTS REQUIRED TO BE FILED IN ELECTRONIC FORMAT.

**§ 240.14d-1 Scope of and definitions applicable to Regulations 14D and 14E.**

(a) *Scope.* Regulation 14D (§§ 240.14d-1 through 240.14d-101) shall apply to any tender offer which is subject to section 14(d)(1) of the Act, including, but not limited to, any tender offer for securities of a class described in that section which is made by an affiliate of the issuer of such class. Regulation 14E (§§ 240.14e-1 and 240.14e-2) shall apply to any tender offer for securities (other than exempted securities) unless otherwise noted therein.

(b) The requirements imposed by sections 14(d)(1) through 14(d)(7) of the Act, Regulation 14D and Schedules TO and 14D-9 thereunder, and Rule 14e-1 of Regulation 14E under the Act, shall be deemed satisfied with respect to any tender offer, including any exchange offer, for the securities of an issuer incorporated or organized under the laws of Canada or any Canadian province or territory, if such issuer is a foreign private issuer and is not an investment company registered or required to be registered under the Investment Company Act of 1940, if less than 40 percent of the class of securities outstanding that is the subject of the tender offer is held by U.S. holders, and the tender offer is subject to, and the bidder complies with, the laws, regulations and policies of Canada and/or any of its provinces or territories governing the conduct of the offer (unless the bidder has received an exemption(s) from, and the tender offer does not comply with, requirements that otherwise would be prescribed by Regulation 14D or 14E), *provided that:*

(1) In the case of tender offers subject to section 14(d)(1) of the Act, where the consideration for a tender offer subject to this section consists solely of cash, the entire disclosure document or documents required to be furnished to holders of the class of securities to be acquired shall be filed with the Commission on Schedule 14D-1F (§ 240.14d-102) and disseminated to shareholders of the subject company residing in the United States in accordance with such Canadian laws, regulations and policies; or

(2) Where the consideration for a tender offer subject to this section includes securities of the bidder to be issued pursuant to the offer, any registration statement and/or prospectus relating thereto shall be filed with the Commission along with the Schedule 14D-1F referred to in paragraph (b)(1) of this section, and shall be disseminated, together with the home jurisdiction document(s) accompanying such Schedule, to shareholders of the subject company residing in the United States in accordance with such Canadian laws, regulations and policies.

NOTES: 1. For purposes of any tender offer, including any exchange offer, otherwise eligible to proceed in accordance with Rule 14d-1(b) under the Act, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold less than 40 percent of such outstanding securities, unless (a) the aggregate trading volume of that class on national securities exchanges in the United States and on NASDAQ exceeded its aggregate trading volume on securities exchanges in Canada and on the Canadian Dealing Network, Inc. ("CDN") over the 12 calendar month period prior to commencement of this offer, or if commenced in response to a prior offer, over the 12 calendar month period prior to the commencement of the initial offer (based on volume figures published by such exchanges and NASDAQ and CDN); (b) the most recent annual report or annual information form filed or submitted by the issuer with securities regulators of Ontario, Quebec, British Columbia or Alberta (or, if the issuer of the subject securities is not a reporting issuer in any of such provinces, with any other Canadian securities regulator) or with the Commission indicates that U.S. holders hold 40 percent or more of the outstanding subject class of securities; or (c) the offeror has actual knowledge that the level of U.S. ownership equals or exceeds 40 percent of such securities.

2. Notwithstanding the grant of an exemption from one or more of the applicable Canadian regulatory provisions imposing requirements that otherwise would be prescribed by Regulation 14D or 14E, the tender offer will be eligible to proceed in accordance with the requirements of this section if the Commission by order determines that the applicable Canadian regulatory provisions are adequate to protect the interest of investors.

(c) *Tier I.* Any tender offer for the securities of a foreign private issuer as defined in § 240.3b-4 is exempt from the requirements of sections 14(d)(1) through 14(d)(7) of the Act (15 U.S.C. 78n(d)(1) through 78n(d)(7)), Regulation 14D (§§ 240.14d-1 through 240.14d-10) and Schedules TO (§ 240.14d-100) and 14D-9 (§ 240.14d-101) thereunder, and § 240.14e-1 and § 240.14e-2 of Regulation 14E under the Act if the following conditions are satisfied:

(1) *U.S. ownership limitation.* Except in the case of a tender offer which is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or § 240.13e-4(h)(8), U.S. holders do not hold more than 10 percent of the class of securities sought in the offer (as determined under Instruction 2 to paragraphs (c) and (d) of this section).

(2) *Equal treatment.* The bidder must permit U.S. holders to participate in the offer on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offer; however:

(i) *Registered exchange offers.* If the bidder offers securities registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the bidder need not extend the offer to security holders in those states or jurisdictions that prohibit the offer or sale of the securities after the bidder has made a good faith effort to register or qualify the offer and sale of securities in that state or jurisdiction, except that the bidder must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(ii) *Exempt exchange offers.* If the bidder offers securities exempt from registration under § 230.802 of this chapter, the bidder need not extend the offer to security holders in those states or jurisdictions that require registration or

qualification, except that the bidder must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(iii) *Cash only consideration.* The bidder may offer U.S. holders only a cash consideration for the tender of the subject securities, notwithstanding the fact that the bidder is offering security holders outside the United States a consideration that consists in whole or in part of securities of the bidder, so long as the bidder has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non-U.S. holders, and either of the following conditions are satisfied:

(A) The offered security is a “margin security” within the meaning of Regulation T (12 CFR 220.2) and the issuer undertakes to provide, upon the request of any U.S. holder or the Commission staff, the closing price and daily trading volume of the security on the principal trading market for the security as of the last trading day of each of the six months preceding the announcement of the offer and each of the trading days thereafter; or

(B) If the offered security is not a “margin security” within the meaning of Regulation T (12 CFR 220.2) the issuer undertakes to provide, upon the request of any U.S. holder or the Commission staff, an opinion of an independent expert stating that the cash consideration offered to U.S. holders is substantially equivalent to the value of the consideration offered security holders outside the United States.

(iv) *Disparate tax treatment.* If the bidder offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders.

(3) *Informational documents.* (i) The bidder must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the home jurisdiction.

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(ii) If the bidder disseminates by publication in its home jurisdiction, the bidder must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(iii) In the case of tender offers for securities described in section 14(d)(1) of the Act (15 U.S.C. 78n(d)(1)), if the bidder publishes or otherwise disseminates an informational document to the holders of the securities in connection with the tender offer, the bidder must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 249.480 of this chapter) by the first business day after publication or dissemination. If the bidder is a foreign company, it must also file a Form F-X (§ 239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

(4) *Investment companies.* The issuer of the securities that are the subject of the tender offer is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), other than a registered closed-end investment company.

(d) *Tier II.* A person conducting a tender offer (including any exchange offer) that meets the conditions in paragraph (d)(1) of this section shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section provided that such tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section:

(1) *Conditions.* (i) The subject company is a foreign private issuer as defined in § 240.3b-4 and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), other than a registered closed-end investment company;

(ii) Except in the case of a tender offer which is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or § 240.13e-4(i), U.S. holders do not hold more than 40 percent of the class of securities sought in the offer

(as determined under Instruction 2 to paragraphs (c) and (d) of this section); and

(iii) The bidder complies with all applicable U.S. tender offer laws and regulations, other than those for which an exemption has been provided for in paragraph (d)(2) of this section.

(2) *Exemptions*—(i) *Equal treatment—loan notes.* If the bidder offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders, notwithstanding § 240.14d-10.

(ii) *Equal treatment—separate U.S. and foreign offers.* Notwithstanding the provisions of § 240.14d-10, a bidder conducting a tender offer meeting the conditions of paragraph (d)(1) of this section may separate the offer into two offers: one offer made only to U.S. holders and another offer made only to non-U.S. holders. The offer to U.S. holders must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers.

(iii) *Notice of extensions.* Notice of extensions made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e-1(d).

(iv) *Prompt payment.* Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e-1(c).

(v) *Subsequent offering period/Withdrawal rights.* A bidder will satisfy the announcement and prompt payment requirements of § 240.14d-11(d), if the bidder announces the results of the tender offer, including the approximate number of securities deposited to date, and pays for tendered securities in accordance with the requirements of the home jurisdiction law or practice and the subsequent offering period commences immediately following such announcement. Notwithstanding section 14(d)(5) of the Act (15 U.S.C. 78n(d)(5)), the bidder need not extend withdrawal rights following the close of the offer and prior to the commencement of the subsequent offering period.

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### *Instructions to paragraphs (c) and (d):*

1. *Home jurisdiction* means both the jurisdiction of the subject company's incorporation, organization or chartering and the principal foreign market where the subject company's securities are listed or quoted.

2. *U.S. holder* means any security holder resident in the United States. Except as otherwise provided in Instruction 3 below, to determine the percentage of outstanding securities held by U.S. holders:

i. Calculate the U.S. ownership as of 30 days before the commencement of the tender offer;

ii. Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by persons who hold more than 10 percent of the subject securities, or that are held by the bidder;

iii. Use the method of calculating record ownership in Rule 12g3-2(a) under the Act (§240.12g3-2(a) of this chapter), except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, the subject company's jurisdiction of incorporation or that of each participant in a business combination, and the jurisdiction that is the primary trading market for the subject securities, if different than the subject company's jurisdiction of incorporation;

iv. If, after reasonable inquiry, you are unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business; and

v. Count securities as beneficially owned by residents of the United States as reported on reports of beneficial ownership that are provided to you or publicly filed and based on information otherwise provided to you.

3. In a tender offer by a bidder other than an affiliate of the issuer of the subject securities, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less (40 percent or less in the case of 14d-1(d)) of such outstanding securities, unless:

i. The tender offer is made pursuant to an agreement with the issuer of the subject securities;

ii. The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States, on the Nasdaq market, or on the OTC market, as reported to the NASD, over the 12-calendar-month period ending 30 days before commencement of the offer, exceeds 10 percent (40 percent in the case of 14d-1(d)) of the worldwide aggregate trading volume of that class of securities over the same period;

iii. The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission indicates that U.S. holders hold more than 10 percent (40 percent in the case of 14d-1(d)) of the outstanding subject class of securities; or

iv. The bidder knows or has reason to know that the level of U.S. ownership exceeds 10 percent (40 percent in the case of 14d-1(d)) of such securities.

4. *United States*. *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

5. The exemptions provided by paragraphs (c) and (d) of this section are not available for any securities transaction or series of transactions that technically complies with paragraph (c) or (d) of this section but are part of a plan or scheme to evade the provisions of Regulations 14D or 14E.

(e) Notwithstanding paragraph (a) of this section, the requirements imposed by sections 14(d)(1) through 14(d)(7) of the Act [15 U.S.C. 78n(d)(1) through 78n(d)(7)], Regulation 14D promulgated thereunder (§§ 240.14d-1 through 240.14d-10), and §§ 240.14e-1 and 240.14e-2 shall not apply by virtue of the fact that a bidder for the securities of a foreign private issuer, as defined in § 240.3b-4, the subject company of such a tender offer, their representatives, or any other person specified in § 240.14d-9(d), provides any journalist with access to its press conferences held outside of the United States, to meetings with its representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed tender offer is discussed, if:

(1) Access is provided to both U.S. and foreign journalists; and

(2) With respect to any written press-related materials released by the bidder or its representatives that discuss a present or proposed tender offer for equity securities registered under Section 12 of the Act [15 U.S.C. 78l], the written press-related materials must

state that these written press-related materials are not an extension of a tender offer in the United States for a class of equity securities of the subject company. If the bidder intends to extend the tender offer in the United States at some future time, a statement regarding this intention, and that the procedural and filing requirements of the Williams Act will be satisfied at that time, also must be included in these written press-related materials. No means to tender securities, or coupons that could be returned to indicate interest in the tender offer, may be provided as part of, or attached to, these written press-related materials.

(f) For the purpose of § 240.14d-1(e), a bidder may presume that a target company qualifies as a foreign private issuer if the target company is a foreign issuer and files registration statements or reports on the disclosure forms specifically designated for foreign private issuers, claims the exemption from registration under the Act pursuant to § 240.12g3-2(b), or is not reporting in the United States.

(g) *Definitions.* Unless the context otherwise requires, all terms used in Regulation 14D and Regulation 14E have the same meaning as in the Act and in Rule 12b-2 (§ 240.12b-2) promulgated thereunder. In addition, for purposes of sections 14(d) and 14(e) of the Act and Regulations 14D and 14E, the following definitions apply:

(1) The term *beneficial owner* shall have the same meaning as that set forth in Rule 13d-3: *Provided, however*, That, except with respect to Rule 14d-3, Rule 14d-9(d), the term shall not include a person who does not have or share investment power or who is deemed to be a beneficial owner by virtue of Rule 13d-3(d)(1) (§ 240.13d-3(d)(1));

(2) The term *bidder* means any person who makes a tender offer or on whose behalf a tender offer is made: *Provided, however*, That the term does not include an issuer which makes a tender offer for securities of any class of which it is the issuer;

(3) The term *business day* means any day, other than Saturday, Sunday or a federal holiday, and shall consist of the time period from 12:01 a.m. through 12:00 midnight Eastern time. In com-

puting any time period under section 14(d)(5) or section 14(d)(6) of the Act or under Regulation 14D or Regulation 14E, the date of the event which begins the running of such time period shall be included *except that* if such event occurs on other than a business day such period shall begin to run on and shall include the first business day thereafter; and

(4) The term *initial offering period* means the period from the time the offer commences until all minimum time periods, including extensions, required by Regulations 14D (§§ 240.14d-1 through 240.14d-103) and 14E (§§ 240.14e-1 through 240.14e-8) have been satisfied and all conditions to the offer have been satisfied or waived within these time periods.

(5) The term *security holders* means holders of record and beneficial owners of securities which are the subject of a tender offer;

(6) The term *security position listing* means, with respect to securities of any issuer held by a registered clearing agency in the name of the clearing agency or its nominee, a list of those participants in the clearing agency on whose behalf the clearing agency holds the issuer's securities and of the participants' respective positions in such securities as of a specified date.

(7) The term *subject company* means any issuer of securities which are sought by a bidder pursuant to a tender offer;

(8) The term *subsequent offering period* means the period immediately following the initial offering period meeting the conditions specified in § 240.14d-11.

(9) The term *tender offer material* means:

(i) The bidder's formal offer, including all the material terms and conditions of the tender offer and all amendments thereto;

(ii) The related transmittal letter (whereby securities of the subject company which are sought in the tender offer may be transmitted to the bidder or its depository) and all amendments thereto; and

(iii) Press releases, advertisements, letters and other documents published by the bidder or sent or given by the

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bidder to security holders which, directly or indirectly, solicit, invite or request tenders of the securities being sought in the tender offer;

(h) *Signatures.* Where the Act or the rules, forms, reports or schedules thereunder require a document filed with or furnished to the Commission to be signed, such document shall be manually signed, or signed using either typed signatures or duplicated or facsimile versions of manual signatures. Where typed, duplicated or facsimile signatures are used, each signatory to the filing shall manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document shall be executed before or at the time the filing is made and shall be retained by the filer for a period of five years. Upon request, the filer shall furnish to the Commission or its staff a copy of any or all documents retained pursuant to this section.

[44 FR 70340, Dec. 6, 1979, as amended at 47 FR 11470, Mar. 16, 1982; 56 FR 30071, July 1, 1991; 60 FR 26622, May 17, 1995; 61 FR 30403, June 14, 1996; 62 FR 53955, Oct. 17, 1997; 64 FR 61404, 61459, Nov. 10, 1999]

### § 240.14d-2 Commencement of a tender offer.

(a) *Date of commencement.* A bidder will have commenced its tender offer for purposes of section 14(d) of the Act (15 U.S.C. 78n) and the rules under that section at 12:01 a.m. on the date when the bidder has first published, sent or given the means to tender to security holders. For purposes of this section, the means to tender includes the transmittal form or a statement regarding how the transmittal form may be obtained.

(b) *Pre-commencement communications.* A communication by the bidder will not be deemed to constitute commencement of a tender offer if:

(1) It does not include the means for security holders to tender their shares into the offer; and

(2) All written communications relating to the tender offer, from and including the first public announcement, are filed under cover of Schedule TO (§240.14d-100) with the Commission no later than the date of the communica-

tion. The bidder also must deliver to the subject company and any other bidder for the same class of securities the first communication relating to the transaction that is filed, or required to be filed, with the Commission.

#### *Instructions to paragraph (b)(2):*

1. The box on the front of Schedule TO indicating that the filing contains pre-commencement communications must be checked.

2. Any communications made in connection with an exchange offer registered under the Securities Act of 1933 need only be filed under §230.425 of this chapter and will be deemed filed under this section.

3. Each pre-commencement written communication must include a prominent legend in clear, plain language advising security holders to read the tender offer statement when it is available because it contains important information. The legend also must advise investors that they can get the tender offer statement and other filed documents for free at the Commission's web site and explain which documents are free from the offeror.

4. See §§230.135, 230.165 and 230.166 of this chapter for pre-commencement communications made in connection with registered exchange offers.

5. "Public announcement" is any oral or written communication by the bidder, or any person authorized to act on the bidder's behalf, that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer.

(c) *Filing and other obligations triggered by commencement.* As soon as practicable on the date of commencement, a bidder must comply with the filing requirements of §240.14d-3(a), the dissemination requirements of §240.14d-4(a) or (b), and the disclosure requirements of §240.14d-6(a).

[64 FR 61459, Nov. 10, 1999]

### § 240.14d-3 Filing and transmission of tender offer statement.

(a) *Filing and transmittal.* No bidder shall make a tender offer if, after consummation thereof, such bidder would be the beneficial owner of more than 5 percent of the class of the subject company's securities for which the tender offer is made, unless as soon as practicable on the date of the commencement of the tender offer such bidder:

(1) Files with the Commission a Tender Offer Statement on Schedule TO